No. 15,051

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SWIFT & COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief For Respondent Swift & Company

MARION B. PLANT,
MOSES LASKY,
BAILEY LANG,
BROBECK, PHLEGER & HARRISON
111 Sutter Street,
San Francisco 4, California
Attorneys for Respondent Swift & Company

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

Page

Statement of the Case 1

The Evidence 2

The Board's Findings 4

The Question 5

Argument 5

I. The fact that the plant clerks are authorized to direct other employees suffices to characterize them as supervisors; it is immaterial that they are without authority to hire, promote, discharge or discipline, or to effectively recommend such action.... 6

II. The Board's finding that the plant clerk's "assignment of work is routine" is contrary to the evidence..... 9

III. The arguments advanced in the Board's brief are unrelated to either the wording of the Act or the facts of the instant case.... 11

Conclusion 12

TABLE OF AUTHORITIES CITED

Cases	Pages
American National Bank of Sapulpa v. Bartlett (CA 10), 40 F.2d 21	10
Local No. 3, United Packinghouse Workers v. N.L.R.B. (CA 8), 210 F.2d 325	10
Matter of Armour & Co. of Delaware, 51 N.L.R.B. 28, 30	7
Matter of Maryland Dry Dock Company, 49 N.L.R.B. 733	6
Matter of Packard Motor Company, 61 N.L.R.B. 4	6, 8
Matter of Swift & Co., 51 N.L.R.B. 24, 26	7
N.L.R.B. v. Armour & Co. (CA 10), 154 F.2d 570	8
N.L.R.B. v. Budd Mfg. Co. (CA 6), 169 F.2d 571	7, 8, 9, 10
N.L.R.B. v. Leland-Gifford Co. (CA 1), 200 F.2d 620	11
N.L.R.B. v. MacSmith Garment Co. (CA 5), 203 F.2d 868	10
N.L.R.B. v. National Die Casting Co. (CA 7), 207 F.2d 344	10
N.L.R.B. v. North Carolina Granite Corp. (CA 4), 201 F.2d 469	11
N.L.R.B. v. Quincy Steel Casting Co. (CA 1), 200 F.2d 293	11
N.L.R.B. v. Reynolds International Pen Co. (CA 7), 162 F.2d 680	10
N.L.R.B. v. Swift & Co. (CA 3), 162 F.2d 575	8
N.L.R.B. v. Whitin Machine Works (CA 1), 204 F.2d 883	11
Ohio Power Co. v. N.L.R.B. (CA 6), 176 F.2d 385	7, 8, 9, 12
Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146	2

STATUTES

Pages

National Labor Relations Act:

Section 2(3) 6

Section 2(11) 6

Section 9(d) 2

Section 14(a) 6

Senate Bill 1126..... 7

TEXTS

Legislative History of the Labor Relations Act, 1947 (Govt. Print. Off. 1948):

Vol. I, pp. 104, 438..... 7

Vol. I, p. 539..... 7

House Conference Report No. 510, 80th Cong., 1st Sess., p. 35..... 7

1 Mecham on Agency (2d ed.), pp. 502-503..... 10

No. 15051

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SWIFT & COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief For Respondent Swift & Company

STATEMENT OF THE CASE

Following direction by the Board of an election in a bargaining unit comprised of plant clerks and standards checkers at Swift's South San Francisco plant and certification of Local 508, Amalgamated Meat Cutters and Butcher Workmen of America, AFL, as the bargaining representative of employees in that unit, Swift refused to bargain with the Union on the ground that the unit was inappropriate.

In the proceedings before the Board, Swift contended that the standards checkers, as well as the plant clerks, were confidential and managerial employees. We do not press that contention here. However, we do not wish to be understood as conceding that it

lacks merit; Swift believes that its contention was sound and that the Board was wrong in holding otherwise. Our failure to press the contention here results from our recognition of the reluctance of the courts to disturb unit determinations involving exercise by the Board of discretionary powers, and from the fact that in any event the unit is inappropriate as a matter of law because of the supervisorial status of the plant clerks.

We therefore direct the Court's attention solely to the plant clerks. As just indicated, it is our position that they are supervisory employees and, therefore, that their inclusion in the unit rendered the unit inappropriate as a matter of law.[1]

The Evidence.

The evidence bearing upon the propriety of the unit consisted entirely of the testimony of Francis S. Sigler, plant superintendent, taken at the hearing in the representation proceedings.[2] There were, therefore, no evidentiary conflicts to be resolved.

The plant is divided into approximately thirty departments (R. 55), each headed by a foreman (R. 41). The departments vary in size. In the smaller departments, the foreman does his own clerical work (R. 47). In the larger departments the foreman is assisted by a plant clerk who does his clerical work and performs various other functions which in the smaller departments are performed by the foreman himself (R. 42-43, 46-47). Depending on

---

1. The propriety of the Board's unit determination in the representation case is, of course, subject to review in the instant proceeding. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146.

2. Section 9(d) of the Act provides that whenever an order of the Board relative to an alleged unfair labor practice is based in whole or in part upon facts certified in a representation proceeding, the record in the representation proceeding shall be part of the record filed with the court in any proceeding to enforce, modify or set aside the order relative to the unfair labor practice. In the present case, the parties stipulated before the Board that the evidence taken in the representation case might be deemed a part of the record in the unfair labor practice proceeding (R. 15, 17).

the size of the departments, a clerk may be assigned to a single department or may be assigned to two or more (R. 79).

The foremen have their desks in plant offices, of which there are twelve (R. 66). There likewise are twelve plant clerks (R. 12). A clerk who assists only one foreman may share a large, double desk with that foreman; otherwise he has a desk of his own adjacent to the desks of the foremen whom he assists (R. 45).

Contrasted with the thirty some-odd foremen and twelve plant clerks, there are a total of 750 employees in the plant (R. 41).

The foreman and his clerk are "a very close team" (R. 100). As above indicated, the clerk not only attends to the clerical work (R. 46), but assists the foreman in various other respects; of particular significance in the present case is the fact that he directs other employees in the performance of certain production operations (R. 42, 43, 81, 99), and that he acts in the foreman's place when the foreman is temporarily absent from the department (R. 47, 82).

Typical of the activities of a plant clerk in directing the work of other employees are the activities of the clerk in the sweet pickle curing cellar, a representative department (R. 42). The products come into the department in barrels (tierces), are weighed and are then trucked to the cellar (R. 80-81). In curing the meats, it is necessary to "overhaul" the tierces from time to time—that is, to move the barrels so as to stir up the meat and cure it properly (R. 43, 81); this "is the most important thing in the production of that particular product" (R. 81). After weighing the incoming products, the plant clerk tells the workmen what to do with them —i.e., to put them in a certain bin in a "certain storage room" or to take them to the "smoke house" or to "dry pack" (R. 42, 80, 99). More important, he directs the overhauling operation, telling the men which barrels to move (not all are moved at the same time (R. 43, 81)) and how far to move them (R. 43).

When we say that the clerk acts in the foreman's place during the latter's absences from the department, we mean that the clerk

"take[s] over the supervision of the department." (R. 47) The occasions for his doing so are not infrequent, but are "many" (ibid.). There are also some production employees who are called upon to relieve supervisors, and who are temporarily upgraded while so doing (R. 82) but it does not appear that this is done where a clerk is available.

The fact that the clerks, like the foremen, are salaried, that they share a locker room with the foremen, and that they are treated in other respects like the foremen, has been touched upon in the Board's brief. At page 5 of its brief it is stated that "Neither plant clerks nor standards checkers can normally expect to be promoted to foreman." Insofar as this statement implies that it is not normal for a plant clerk to be promoted to foreman, it is misleading. It is true that there is no fixed line of progression which excludes the possibility of a production worker being promoted directly to a foreman's job (R. 104). But the fact is that a large percentage of the foremen were formerly plant clerks or standards checkers (R. 54). Mr. Sigler, the plant superintendent, was himself, at one time, a plant clerk (R. 42).

The Board's Findings

In its Decision and Direction of Election in the representation proceedings, the Board made the following findings as to the duties of plant clerks (R. 8-9):

> "The plant clerks work with foremen in plant department offices. They maintain department records pertaining to costs, production time spent by employees in production processes, and inventory. When necessary, they also compile data for use by the foremen in processing grievances. In addition, *they tell employees where to place and when to move certain products in the course of processing, and they take charge of the department for short intervals when a foreman is absent.* However, they have no power to hire or discharge or effectively recommend such action, nor do they

handle grievances. Their assignment of work is routine." (Emphasis supplied).

It will be noted that the Board found, in accordance with the evidence above summarized (a) that the plant clerks "tell employees where to place and when to move certain products in the course of processing," and (b) that "they take charge of the department for short intervals when a foreman is absent." The Board nevertheless concluded that they were employees within the meaning of the Act—not supervisors (R. 9). That conclusion apparently was grounded upon the concluding statement above quoted (the basis of which is unknown to us) that "Their assignment of work is routine."

THE QUESTION

The question is whether the plant clerks are supervisors. As we shall see, the answer to that question depends upon whether the evidence supports the Board's finding that the clerk's "assignment of work is routine."

If the plant clerks are supervisors, as we submit they are, then the unit was inappropriate and Swift was not guilty of a refusal to bargain with the representative of its employees in an appropriate unit.

ARGUMENT

The evidence shows, and the Board has found, that the plant clerk directs the work of other employees and that he has charge of the department during the foreman's absences. He therefore is a supervisor unless it be true, as the Board has found, that his "assignment of work is routine." The fact is that this finding is contrary to the evidence and that enforcement of the Board's order therefore should be denied. To elaborate:

I. The fact that the plant clerks are authorized to direct other employees suffices to characterize them as supervisors; it is immaterial that they are without authority to hire, promote, discharge or discipline, or to effectively recommend such action.

The National Labor Relations Act, while requiring bargaining with employees, excludes supervisors in defining the term "employee" (Sec. 2(3)), and provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining" (Sec. 14(a)). It defines the term "supervisor" as follows (Sec. 2(11)):

> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, *or responsibility to direct them,* or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (Emphasis supplied).

We have italicized the phrase "or responsibility to direct them" in the foregoing definition because it was inserted by amendment on the Senate floor when the Taft-Hartley Act was in the process of enactment in order to characterize as supervisorial a function which the Board had not theretofore regarded as such, and because it is the phrase which is controlling of the instant case. During the period from 1943, when the Board held in *Matter of Maryland Dry Dock Company,* 49 N.L.R.B. 733, that a unit embracing supervisors having certain types of authority was not appropriate for collective bargaining, and 1945, when in *Matter of Packard Motor Company,* 61 N.L.R.B. 4, the Board reversed itself, the Board defined the supervisors to be excluded from bargaining units as:

> "* * * supervisory employees who have authority to hire, promote, discharge, discipline or otherwise effect changes

in the status of employees, or effectively recommend such action."

See, e.g.,

Matter of Swift & Co., 51 N.L.R.B. 24, 26;

Matter of Armour & Co. of Delaware, 51 N.L.R.B. 28, 30.

The definition of supervisor in the Senate Bill as originally reported[3] did not contain the phrase which we have italicized above in the provision finally enacted, but was substantially the same as the definition which had been employed by the Board and which we have just quoted. It was to the definition contained in the bill as originally reported that the Senate Report referred when it said, in the language quoted in the Board's brief (p. 9, n. 5), that the bill "adopted the test which the Board itself has made."[4] Thereafter the bill was amended on the Senate floor at the instance of Senator Flanders to insert the phrase italicized above and thus, in the words of Senator Flanders, to embrace "the basic act of supervising." 93 Congressional Record 4677-4678 (1947); 2 Leg. Hist. 1303-1304. By reason of that insertion, the Act excludes as a supervisory employee an individual having authority to direct other employees although he has no authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or to effectively recommend such action. *N. L. R. B. v. Budd Mfg. Co.* (CA 6), 169 F.2d 571; *Ohio Power Co., v. N. L. R. B.* (CA 6), 176 F.2d 385.

---

3. S. 1126; see Legislative History of the Labor Management Relations Act, 1947 (Govt. Print. Off. 1948), hereinafter cited as "Leg. Hist.", Vol. I, pp. 104, 438.

4. The House Conference Report, which the Board also cites, and which dealt with the bill in its final form, did not employ the language quoted in the Board's brief, but stated simply that "The conference agreement, in the definition of 'supervisor', limits such term to those individuals treated as supervisors under the Senate amendment." H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 35; see I Leg. Hist., p. 539.

As above noted, the Board has found that the plant clerks "tell employees where to place and when to move certain products in the course of processing, and they take charge of the department for short intervals when a foreman is absent." The Board's further finding that "they have no power to hire or discharge or effectively recommend such action" does not amount to a denial of the existence of supervisorial status, for, as above noted, the definition of supervisor is in the disjunctive, and possession of any one of the qualifications mentioned in the definition places an employee in the supervisory class. *N. L. R. B. v. Budd Mfg. Co.* (CA 6), *Ohio Power Co. v. N. L. R. B.* (CA 6), both *supra.*

While the Board did not find in so many words that the plant clerks have authority "responsibly to direct other employees," it is apparent from the evidence that they do have such authority and the Board so found in substance. Certainly it did not find otherwise. The unconflicting evidence is that the clerk regularly directs other employees in the performance of the most important part of the processing operation and that in the absence of the foreman he takes the latter's place in directing other phases of the work as well. These are the controlling facts.

The Board's brief places its chief reliance on *N. L. R. B. v. Armour & Co.* (CA 10), 154 F.2d 570 and *N. L. R. B. v. Swift & Co.* (CA 3), 162 F.2d 575. Both arose and were decided before amendment of the Act to exclude supervisors, and neither has any bearing on the instant case. The *Armour* case simply upheld the Board in applying its old test of supervisorial status, holding that the employees in question were properly included in the unit because they had "no power to hire, to discharge, to promote or demote, or even to make recommendations in these respects." 154 F.2d at 575. In the *Swift* case, which was decided after the Supreme Court's affirmance of the *Packard Motor Company* decision, the court felt it unnecessary to pass upon the question whether the individuals concerned were supervisors; it held that

whether or not they were supervisors they were "employees" within the meaning of the Act and that the question whether they should be included in the bargaining unit was one for the Board to decide in the exercise of a "broad discretion." 162 F.2d at 580.

II. The Board's finding that the plant clerk's "assignment of work is routine" is contrary to the evidence.

Apparently, the Board based its conclusion that the plant clerks are not supervisors upon its finding that "Their assignment of work is routine." That finding is not justified by anything in the evidence. The statutory requirement that the exercise of supervisorial authority be "not of a merely routine or clerical nature" but that it involve "the use of independent judgment" does not mean that an individual must act without the guidance of detailed instructions, rules or blueprints to qualify as a supervisor. *N.L.R.B. v. Budd Mfg. Co., supra.* Even were the law otherwise, there is no evidence that the plant clerk, in directing the work of others, is an automaton activated by electrical impulses from a set of instructions, rules or blueprints. On the contrary, the evidence clearly indicates that his work involves the use of judgment in directing the placing and movement of products and in dealing with problems arising in the foreman's absence.

The definition of "supervisor" is not to be given a restrictive interpretation. *Ohio Power Co. v. N.L.R.B., supra.* The phrase "responsibility to direct other employees" means simply that the individual must be "answerable for the discharge of a duty or obligation" to direct; responsibility "is implied from power." Ibid., 176 F.2d at 387. Thus, individuals are supervisors though "they carry out production schedules which have been arranged and blueprinted for them and from which they can depart only in minor matters or in emergencies," and although they are guided in everything they do by "established rules and regulations" or by "directions from their own supervisors," it being sufficient that

they exercise discretion in carrying out their orders. *N.L.R.B. v. Budd Mfg. Co., supra.*

An agent assigned the performance of a certain function is presumed to have authority to perform all acts necessary to the performance of that function. *American National Bank of Sapulpa v. Bartlett* (CA 10), 40 F.2d 21; 1 Mecham on Agency (2d ed.), pp. 502-503. It therefore is to be presumed in the absence of evidence to the contrary that an individual having authority to direct the work of other employees has authority to formulate the directions which he thus gives, a process necessarily involving the exercise of judgment. As above noted there is no evidence that the plant clerk was a mere conduit for transmitting orders formulated by a superior. In the absence of such evidence, it is to be presumed that he was authorized to formulate the instructions which he gave and that the exercise of his authority thus involved the exercise of judgment and discretion.

The burden was upon the Board to prove its charge affirmatively and by substantial evidence. *Local No. 3, United Packinghouse Workers v. N.L.R.B.* (CA 8), 210 F.2d 325; *N.L.R.B. v. MacSmith Garment Co.* (CA 5), 203 F.2d 868; *N.L.R.B. v. National Die Casting Co.* (CA 7), 207 F.2d 344; *N.L.R.B. v. Reynolds International Pen Co.* (CA 7), 162 F.2d 680. The burden thus was upon the Board to prove that the bargaining unit in question was appropriate. While Swift may have been under a duty to go forward with evidence of the supervisory status of the plant clerks, that duty was satisfied by the introduction of evidence that the plant clerks are authorized to direct, and do direct, the work of other employees. There being no evidence that they were mere conduits for the transmission of directions formulated by others, the Board's finding that "Their assignment of work is routine" is unsupported by evidence, and its conclusion that they lacked supervisory status is contrary to law.

III. The arguments advanced in the Board's brief are unrelated to either the wording of the Act or the facts of the instant case.

The Board asserts in its brief that persons possessing only "minor supervisory duties" are not supervisors within the meaning of the Act, citing *N.L.R.B. v. Quincy Steel Casting Co.* (CA 1), 200 F.2d 293, and *N.L.R.B. v. North Carolina Granite Corp.* (CA 4), 201 F.2d 469. The *Quincy Steel Casting Co.* decision involved a molder who, working along with another molder, was required to pour hot metal from ladles into molds three or four times a day and who coordinated the efforts of the other molder with his own by telling him "when to start and when to stop pouring." 200 F.2d at 295. The *North Carolina Granite Corp.* decision involved a carpenter who worked as the "lead hand" with two other carpenters in a repair squad. Whether or not the foregoing decisions were sound, the powers and duties of the molder and the carpenter were in no way comparable to those of the plant clerks involved in the present case. As for the statute itself, it does not make supervisory status depend upon whether the supervisory duties are major or "minor." An individual is a supervisor if he has authority "responsibly to direct" the work of others, and he is not deprived of supervisory status by the fact that his authority does not extend or relate to such matters as hiring, promotion, discipline or discharge. The Board's brief seems to suggest that supervisory authority is "minor" and does not confer supervisory status if it is limited to directing the work of others; but the statute clearly provides otherwise.

The Board also argues that supervisory status is not conferred by authority to exercise a supervisory function only "spasmodically and infrequently," citing *N.L.R.B. v. Leland-Gifford Co.* (CA 1), 200 F.2d 620, the *Quincy Steel Casting Co.* decision, *supra,* and *N.L.R.B. v. Whitin Machine Works* (CA 1), 204 F.2d 883. The *Leland-Gifford Co.* decision in fact held that it was the existence of the authority and not the frequency of its exercise that mattered,

and the case therefore was sent back to the Board to reconsider its findings which had denied the existence of supervisorial status. See also *Ohio Power Co. v. N.L.R.B.* (CA 6), 176 F.2d 385. However, we need not debate this abstract question of law, for neither the authority of the plant clerks nor its exercise is limited to "spasmodic" or "infrequent" occasions. The plant clerks are authorized to direct, and do in fact direct, as a regular part of their daily work the processing operations hereinabove mentioned. In addition, they relieve the foremen. The occasions upon which they do this last are not "infrequent" or "spasmodic" but are "many"; but even if such occasions were infrequent, the fact would remain that even when the foremen are present, the plant clerks regularly direct the processing operations hereinabove mentioned, and that it is the sum total of their supervisory authority, and not a single segment of it, that is determinative of their status.

CONCLUSION

The Board's order is erroneous in establishing a bargaining unit which includes supervisors, namely, the plant clerks, and in requiring respondent to bargain with the representative of such a unit. Hence the Board's petition for enforcement of its order should be denied and the order itself should be set aside.

Dated: August 13, 1956.

Respectfully submitted,

MARION B. PLANT,
MOSES LASKY,
BAILEY LANG,
BROBECK, PHLEGER & HARRISON
Attorneys for Respondent
Swift & Company